Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

STEPHEN A. SACCOCCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, following *Ring v. Arizona*, ___ U.S. ___, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the District Court and the Court of Appeals erred in determining that Petitioner was not denied a substantial constitutional right when Petitioner was sentenced to a term of more than 647 years beyond the maximum punishment he would have received according to the facts found by the jury, thereby depriving Petitioner of the right to a jury trial under the Sixth Amendment to the United States Constitution.

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PETITION FOR A WRIT OF CERTIORARI

Mark E. Overland, Overland and Borenstein, LLP, on behalf of Stephen A. Saccoccia, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit

OPINION BELOW

The order of the Court of Appeals is unreported and is reproduced at App. A, 1-15.

JURISDICTION

The order of the Court of Appeals was entered on July 29, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portion of the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . . " The provisions of 18 U.S.C. §§ 3553, 3584; 28 U.S.C. §§ 994, 2253(c)(1), (2) and 2255; and USSG §§ 3D1.3, 5G1.1 and 5G1.2 are reproduced at App. G-N, 59-83.

STATEMENT OF THE CASE

Petitioner is serving an unprecedented term of 660 years of imprisonment based on a general verdict rendered on March 12, 1993, following a trial on an indictment alleging one count of a RICO conspiracy (18 U.S.C. § 1962(d)), 36 counts of engaging in monetary transactions in criminally derived property (18 U.S.C. § 1957), 13 counts of money laundering (18 U.S.C. § 1956), and 4 counts of interstate travel in aid on racketeering (18 U.S.C. § 1952).

On May 12, 1993, the district court sentenced Petitioner to this draconian term of imprisonment for these non-violent offenses. Additionally, the district court ordered Petitioner to pay a fine of $15,754,150.00 and entered a forfeiture order of $136,344,231.

Judgment was affirmed on June 25, 1995 in *United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995). The district court denied Petitioner's Motion pursuant to 28 U.S.C. § 2255 in *Saccoccia v. United States*, 69 F. Supp. 2d 297 (D.R.I.1999), and refused to grant a certificate of appealability under 28 U.S.C. § 2253. A certificate of appealability was also denied by the Court of Appeals in *United States v. Saccoccia*, Nos. 99-2341, 02-1556 (1st Cir. 2002).

STATEMENT OF FACTS

Counts 38 through 98 and 121 through 133 of the Fourth Redacted Indictment against Petitioner (the substantive counts pursuant to 18 U.S.C. §§ 1956, 1957) alleged a total of $9,382,754 in laundered funds. Counts 134 through 141 (the Travel Act violations pursuant to 18

U.S.C. §§ 1952(a)(3) and (2)) alleged only one amount of $248,000 in count 134. Count 1 of the indictment alleged a RICO conspiracy (18 U.S.C. § 1962(d)). The RICO count alleged four overt acts, including the purchase of monetary instruments, bank deposits of monetary instruments, wire transfers in the amount of $136,344,231.00, and the receipt and transfer of $98,000 in currency. (App. C, 16-37)

The jury was not charged with making any specific findings and returned a general verdict on all counts of the indictment.[1] (App. D, 38-44)

During the sentencing hearing, defense counsel objected to the Probation Department's recommendation that Petitioner be held responsible for $136,344,241.00 resulting from his conviction on the RICO conspiracy count. Counsel argued that the jury's verdict on the RICO count did not constitute a finding of any specific amount of laundered money, that the amount charged in the substantive offenses charged and proven at trial was less than ten million dollars, and that amount, determined by the jury, should be the base for application of the Sentencing Guidelines. (App. E, 48-50)

The district judge adopted the recommendation of the Probation Department that all counts of conviction be grouped pursuant to USSG § 3D1.2(d) and set Petitioner's base offense level at 23 according to USSG § 2S1.1(a)(1).

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[1] Any two of the substantive offenses could have been the basis of the jury's guilty verdict on the RICO conspiracy count. An overt act is not an element of a RICO conspiracy. *Salinas v. United States*, 522 U.S. 52 (1977).

Utilizing the preponderance of the evidence standard as a basis for its findings, the court imposed the following enhancements: (a) 13 levels pursuant to USSG § 2S1.1(b)(2)(N), finding that the amount of money laundered exceeded $100,000,000; (b) 3 levels pursuant to USSG § 2S1.1(b)(1), finding that the money laundered represented the proceeds of narcotic sales; (c) 4 levels pursuant to USSG § 3B1.1, finding a leadership role; (d) 2 levels pursuant to USSG § 3C1.1, finding obstruction of justice. This resulted in a total adjusted guideline level of 45. The trial court then placed Petitioner in Criminal History Category II as a result of a prior conviction. Because level 43 or greater requires a life sentence under the guidelines, the trial court imposed consecutive terms of imprisonment under USSG § 5G1.2(d) in an attempt to reach the total punishment. *United States v. Saccoccia*, 58 F.3d 754, 785-786 (1st Cir. 1995). (App. F, 51-58)

REASONS FOR GRANTING THE PETITION

This case presents an important question of federal law regarding the validity of recent decisions of various Courts of Appeals[2] that are contrary to *Apprendi v. New*

[2] Contrary to the pronouncement of *Ring v. Arizona*, ___ U.S. ___, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the following Circuits have found no Sixth Amendment violation, or no denial of defendant's substantial rights, when the district court determines the "total punishment" by a preponderance of the evidence on the basis of facts not found by the jury: *United States v. McLean*, 287 F.3d 127 (2d Cir. 2002); *United States v. Feola*, 275 F.3d 216 (2d Cir. 2001); *United States v. White*, 238 F.3d 537 (4th Cir. 2001); *United States v. Angle*, 254 F.3d 514 (4th Cir. 2001); *United States v. McWaine*, 290 F.3d 269 (5th Cir.

(Continued on following page)

Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000) and its progeny.

Can a district court, consistent with *Apprendi* and *Ring*, determine the "total punishment" mandating the imposition of consecutive sentences under USSG § 5G1.2(d), on the basis of facts which have not been determined by the jury's verdict?

Under 18 U.S.C. § 3584(a), if multiple terms of imprisonment are imposed on a defendant at the same time, the terms may be concurrent or consecutive. Pursuant to 28 U.S.C. § 994(a)(1)(D), the sentencing guidelines should be used by the trial court in making "a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively."

Pursuant to USSG § 5G1.2(d), if the sentence on the count carrying the highest statutory maximum is less than the "total punishment" determined by the court, then the sentence imposed on one or more of the other counts must run consecutively, but only to the extent necessary to produce a combined sentence equal to the "total punishment." While § 5G1.2 does not expressly define "total punishment," its commentary instructs that "[t]he combined length of the sentences ('total punishment') is determined by the adjusted combined offense level and the Criminal History Category."

2002); *United States v. O'Hara*, 301 F.3d 563 (7th Cir. 2002); *United States v. Hollingsworth*, 298 F.3d 700 (8th Cir. 2002); *United States v. Diaz*, 296 F.3d 680 (8th Cir. 2002); *United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002); *United States v. Gallego*, 247 F.3d 1191 (11th Cir. 2001).

Petitioner's "total punishment" was based on the aggregate amount of money the trial court alone found, by a preponderance of the evidence, to have been laundered. Because this "total punishment" exceeded the highest statutory maximum on any count, the Guidelines required that the sentences run consecutively, in order to achieve the "total punishment." USSG § 5G1.2(d).

Pursuant to the facts alleged and found by the jury to have been proven beyond a reasonable doubt, the amount of money laundered as reflected in Counts 38 through 98 and 131 through 134 totaled less than $10 million. If this jury-determined fact had been utilized to determine the "total punishment," Petitioner's base offense level of 23 would have been increased by 8 levels pursuant to USSG §2S1.1(b)(2)(I). The applicable sentencing guideline table at Criminal History Category II, in accord with the facts reflected by the jury's verdict, would have limited Petitioner's "total punishment" to between 121 and 151 months of imprisonment, and no consecutive sentences could have been imposed.[3]

The Sixth Amendment does not permit the imposition of a sentence exceeding the facts reflected in the jury's verdict.

> "The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a

[3] The district court utilized the November 1, 1992 edition of the federal sentencing guidelines in its sentencing calculations. *United States v. Saccoccia*, 58 F.3d 754, 785 (1st Cir. 1995).

> legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."

Apprendi, at 483.

In *Harris v. United States*, ___ U.S. ___, 122 S. Ct. 2406, 2414, 153 L. Ed.2d 524 (2002), this Court explained that:

> "*Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime – and thus the domain of the jury – by those who framed the Bill of Rights."

In *Apprendi*, the government argued that, even without the sentencing error, the judge could have imposed consecutive sentences on two counts that would have produced the twelve-year term of imprisonment that Apprendi received. 530 U.S. at 474. This Court rejected the argument, stating that the constitutional question was "whether the 12-year sentence imposed on Count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count." *Id.*

Similarly, the constitutional question herein is whether the "total punishment" chosen by the district court as the trigger for the mandatory imposition of consecutive sentences is permissible, when that trigger exceeds the maximum applicable Sentencing Guidelines of approximately 10 to 12½ years, according to the facts found by the jury.

In determining the violation of Petitioner's Sixth Amendment right, it is of no consequence that the sentence imposed on Petitioner does not exceed the maximum statutory aggregate of the ultimate consecutive terms, for the jury's verdict did not require or even authorize the imposition of consecutive sentences. Rather, the trial court determined that consecutive sentences were mandated under the Sentencing Guidelines, by calculating the "total punishment" on the basis of facts not found by the jury.

Following *Apprendi*, this Court's recent decision in *Ring v. Arizona*, ___ U.S. ___, 122 S. Ct. 2428, 153 L. Ed.2d 556 (2002), held that the Sixth Amendment does not permit a defendant to be exposed to a penalty exceeding the maximum he would receive if punished according to the jury verdict. In a concurring opinion, Justice Scalia, whom Justice Thomas joined, clearly defined the contours of such maximum punishment.

> "I believe that the fundamental meaning of the jury trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives whether the statute calls them elements of the offense, sentencing factors or Mary Jane must be found by the Jury beyond a reasonable doubt."

Id. at 2444.

In *Ring v. Arizona*, this Court also explained the meaning of *Apprendi*:

> "[t]he dispositive question . . . is one not of form, but of effect. . . . If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury

> beyond a reasonable doubt. . . . A defendant may not be exposed . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. . . . All the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury."

Ring v. Arizona, 122 S. Ct. 2439-2440 (internal citations and quotations omitted, emphasis in original).

The maximum punishment Petitioner would have received pursuant to the jury's verdict, according to applicable Sentencing Guidelines was 121 to 151 months of imprisonment. Based on facts not determined by the jury's verdict, Petitioner instead received a sentence of 660 years of imprisonment.

As Justices Scalia and Stephens emphasized in their concurring opinions in *Jones v. United States*, 526 U.S. 227, 253, 143 L. Ed.2d 311, 119 S. Ct. 1215 (1999), "it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed." It is likewise unconstitutional to remove from the jury the assessment of facts that alter the sentencing limits imposed on a defendant by the Sentencing Guidelines.

CONCLUSION

The recent decisions of this Court delineating the meaning of the Sixth Amendment jury trial guarantee, and the interests of justice, mandate that this Court clearly establish the principle that a criminal defendant cannot be sentenced to an increased term of imprisonment

based on facts not determined by the jury. Specifically, Petitioner cannot be sentenced to a term of 660 years when, according to the findings of the jury that convicted him, the maximum sentence he could have received under the Sentencing Guidelines would have been 121 to 151 months.

For all of the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

**[NOT FOR PUBLICATION –
NOT TO BE CITED AS PRECEDENT]**

United States Court of Appeals

For the First Circuit

No. 99-2310

DONNA SACCOCCIA,

Petitioner,

v.

UNITED STATES,

Respondent.

Nos. 99-2341
02-1556

STEPHEN A. SACCOCCIA,

Petitioner,

v.

UNITED STATES,

Respondent.

APPEALS FROM THE UNTIED STATES
DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND

[Hon. Ernest C. Torres, *U.S. District Judge*]

Before

Boudin, *Chief Judge,*
Selya and Lipez, *Circuit Judges.*

Mark E. Overland and *James Moretti* on memorandum for petitioner Stephen A. Saccoccia.

William J. Murphy on memorandum for petitioner Donna Saccoccia.

Sheldon Whitehouse, United States Attorney, and *James H. Leavey,* Assistant U.S. Attorney, on memorandum for respondent.

July 29, 2002

Per Curiam. Petitioners Stephen and Donna Saccoccia were convicted of multiple offenses involving the laundering of proceeds from illegal drug transactions. After their convictions and sentences were affirmed on appeal, *see United States v. Saccoccia,* 58 F.3d 754 (1st Cir. 1995); *United States v. Hurley,* 63 F.3d 1 (1st Cir. 1995), they filed motions under 28 U.S.C. § 2255 to vacate their sentences, advancing a series of claims. In a pair of comprehensive decisions (one of which is published, the other not), the district court denied relief and thereafter declined to issue a certificate of appealability (COA). *See Saccoccia v. United States,* 69 F. Supp. 2d 297 (D.R.I. 1999). Petitioners, through counsel, have now filed separate applications with this court for COAs.

In order to qualify for a COA, a habeas petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires a demonstration that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were

'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 n.4 (1983) (internal quotation marks omitted)). Having scrutinized the parties' filings and the underlying record, we conclude that neither petitioner has satisfied this standard. We reach this conclusion substantially for the reasons recited by the district court, adding only the following observations with respect to some of the claims advanced.

I. Stephen Saccoccia's Petition (No. 99-2341)

1. Interference with Right to Assistance of Counsel[1]

The speculative nature of Stephen's assertion that the United States government caused his attorney (Jack Hill) to be arrested deserves emphasis. Indeed, the precise nature of his complaint in this regard is never explained. To the extent Stephen is alleging that the government purposefully interfered with Hill's preparations, his contention is belied by his own suggestion that the "trap" was intended for someone else. And to the extent he is alleging that the government's actions had the effect of rendering Hill ineffective, the district court justifiably concluded that the mistrial and severance had eliminated that concern (even though the "four month delay" there cited was in fact three months). *See* 69 F. Supp. 2d at 300-01; *cf. Saccoccia,* 58 F.3d at 771 (upholding denial of

[1] For ease of reference, we have used section headings corresponding to those of the district court.

request for continuance after finding that "the means for efficacious preparation were tidily at hand").

2. Double Jeopardy

Apart from the issues addressed by the district court, Stephen has hinted at an additional argument: that, because of government overreaching and Hill's conflict of interest, his request for a mistrial was coerced and invalid, with the result that the government had to establish manifest necessity for the mistrial. Yet the charges of overreaching and conflict of interest are unsupported. And this claim overlooks the sudden incapacity of Attorney Brian Adae.

3. Conflict of Interest

The contention that Hill's potential conflict constituted a *per se* violation of the Sixth Amendment is further belied by intervening case law. We recently rejected a *per se* rule in analogous circumstances, holding that "a defendant has not shown a fatal conflict by showing only that his lawyer was under investigation [for related criminal activity] and that the lawyer had some awareness of an investigation." *Reyes-Vejerano v. United States,* 276 F.3d 94, 99 (1st Cir. 2002); *cf. Mickens v. Taylor,* 122 S. Ct. 1237 (2002) (rejecting "automatic reversal" rule where trial court fails to inquire into potential conflict about which it knew or reasonably should have known).

Stephen's challenge to the validity of his waiver also clearly fails. To the extent it rests on an assertion that the United States' investigation of Hill was ongoing (unbeknownst to Stephen), the claim is factually unsupported.

And to the extent it rests on an assertion that Stephen was unaware of the details of that investigation, it provides no basis for relief. Before accepting the waiver, the court specifically cautioned Stephen that Hill might have an incentive to conduct the trial in a manner that would serve his own interests rather than those of his client. This same warning would have sufficed even if Stephen had been more fully informed about the Hill investigation.

Beyond these points, Stephen asserts that his waiver was invalid for three additional reasons. He contends that: (1) he was unaware of other key facts; (2) Attorney Kenneth O'Donnell withheld any advice about whether to sign the waiver; and (3) Stephen was coerced into signing by Hill and Donna's attorney (Lawrence Semenza). As to the first, we have examined the "facts" in question and find them to be of scant significance. And the other two assertions are undermined by Stephen's own remarks at the waiver hearing. *See* 12/10/92 Tr. at 22 (indicating he had rejected O'Donnell's advice to secure an opinion from another attorney); *id.* at 29 (denying that anyone had pressured him to sign the waiver).

The related argument advanced by Stephen – that, notwithstanding the waiver, Hill suffered from an actual conflict that adversely affected the adequacy of his representation – likewise falls short. Stephen points in this regard to various alleged omissions by Hill. Yet as the district court noted, he has not made either of the requisite showings in this regard – i.e., that one or more of these challenges had a plausible chance of succeeding, and that Hill's failure to pursue them was linked to his alleged conflict. *See, e.g., Reyes-Vejerano,* 276 F.3d at 97. Hill's failure to challenge the seizure of attorney-client materials, although not mentioned by the district court in this

context, would not warrant relief for the reasons the court described elsewhere.

Stephen's attempt to beef up an argument previously rejected on direct appeal – that his co-counsel O'Donnell likewise suffered from a conflict of interest – also proves unavailing. His suggestion that a March 1993 defense proffer put the district court on notice three months earlier of a potential conflict is obviously mistaken. His assertion that failure to inquire into a potential conflict requires automatic reversal is at odds with the Supreme Court's recent *Mickens* decision. And his own evidence, *see* Dkt. 1, Exh. 13, at 6-7, buttresses our earlier finding that nothing in the record "suggests that Marotto had any knowledge that might have been useful in [Stephen's] defense." *Saccoccia,* 58 F.3d at 772.

Finally, Stephen contends that both of his trial attorneys suffered from an additional conflict, stemming from the fact that they accepted payment from assets subject to a protective order. Yet there has never been any hint of a criminal investigation along these lines. And the district court later held that all fees received prior to the date of conviction were not subject to forfeiture. *See United States v. Saccoccia,* 165 F. Supp. 2d 103 (D.R.I. 2001).

4. Brady Violations

It is undisputed that Barry Slomovits testified falsely at Stephen's trial. During cross-examination, he denied that any of his business partners had known about his money-laundering activities; the government later revealed that he had lied about the noninvolvement of his partner Alan Finkelstein. Stephen now alleges that the prosecutors were aware of such perjury at the time. Yet he

relies solely on an August 1994 affidavit from a Customs agent in New York, who stated that Finkelstein had been under investigation since February 1991 (approximately two years prior to Stephen's trial). This affidavit was insufficient to trigger a further inquiry by the habeas court. Not only did it make no mention of Slomovits, but Slomovits had specifically denied Finkelstein's involvement during government debriefings held between 1992 and 1994. In any event, even if we assume arguendo that the government knowingly failed to correct such perjury, the error would be harmless if it "more likely than not had no effect on the verdict." *Gilday v. Callahan,* 59 F.3d 257, 269 (1st Cir. 1995). Given the tangential nature of Slomovits' falsehood, the fact that it appeared only in a single exchange on cross-examination, and the overwhelming evidence of Stephen's guilt, such would certainly be the case here.[2] Much the same analysis applies to the alleged perjury by Ahron Sharir.

5. The § 1957 Convictions

In a muddled ineffective-assistance claim, Stephen complains of counsel's failure to object to the jury instructions regarding 18 U.S.C. § 1957. The district court determined that this argument could have been raised on direct appeal and so was procedurally defaulted. *See* 69 F. Supp. 2d at 305-06. As the claim plainly fails on the merits, we

[2] We thus need not address the district court's conclusion that, where the government is alleged to have unwittingly relied on perjured testimony, a § 2255 petition "is governed by the standard applicable to a motion for a new trial based on newly discovered evidence." 69 F. Supp. 2d at 304.

prefer to dispose of it on that basis. It suffices to note the following. First, the specific language about which Stephen complains was not part of the court's instructions. Second, § 1957 does not, as he suggests, require that "all" of the transferred funds have a drug source; even under *United States v. Rutgard,* 116 F.3d 1270 (9th Cir. 1997), upon which he relies, it need only be shown that each transfer included more than $10,000 in tainted funds. Third, the charge here would seemingly pass muster under *Rutgard.* And even if not, it is never explained why counsel would have been deficient for not anticipating the emergence of this line of authority. Finally, Stephen ignores the fact that laundered drug proceeds could appear in his account as ostensibly "legitimate" funds.

6. The § 1956 Convictions

Trial Exhibit 2312 (which Stephen misidentifies as Exh. 2310) effectively belies his renewed challenge to the evidence supporting these convictions.

7. Interception of Attorney-Client Communications

This claim, although the subject of considerable attention below, likewise requires little comment. The district court made detailed findings after an evidentiary hearing – determining that only two of the exhibits in question had been forwarded to the prosecution; that the first of these was nonprivileged; and that the second, even if privileged, was so vague that disclosure thereof entailed no prejudice. Stephen has advanced no challenge to such findings, and our review of the record reveals them to be fully supportable.

8. Apprendi Claim

Finally, Stephen seeks to supplement his COA application to include a claim under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Yet even if *Apprendi* proves to be cognizable on collateral review, this claim would fail. "[T]he vice in *Apprendi* was the imposition of a sentence on a single count . . . in excess of the statutory maximum for that count." *United States v. Feola*, 275 F.3d 216, 220 n.1 (2d Cir. 2001) (per curiam). That did not occur here. As we explained on direct appeal, the sentencing court "imposed the longest possible sentence on each count and ran the sentences consecutive to one another." 58 F.3d at 786. This was done, we noted, pursuant to U.S.S.G. § 5G1.2(d), which "require[s] imposition of consecutive sentences 'to the extent necessary to produce a combined sentence equal to the total punishment.'" *Id.* (quoting guideline). Contrary to Stephen's suggestion, *Apprendi* poses no bar under these circumstances to the imposition of consecutive sentences under § 5G1.2(d), even when "the total punishment exceeds the highest statutory maximum on any particular count." *United States v. McWaine*, 290 F.3d 269, 276 (5th Cir. 2002); *accord, e.g., Feola*, 275 F.3d at 220 n.1.

II. Donna Saccoccia's Petition (No. 99-2310)

1. Mental Competency/Ineffective Assistance

Donna first faults Semenza, her main trial lawyer, for delay in pursuing the question of her mental competency. We doubt that counsel's performance could be deemed deficient in this regard. For example, contrary to Donna's suggestion, the magistrate judge at the hearing held on July 23, 1992 did not "instruct" or "admonish" him to obtain a psychiatric evaluation. And Semenza mentioned

two months later that Donna had been "assisting" him with the defense preparations. Regardless, Donna has failed to satisfy the prejudice requirement for the reasons cited by the district court.

2. Failure to Transmit Plea Offer

Donna here claims that Semenza failed to advise the government of her desire to cooperate and plead guilty and, moreover, failed to advise her of a plea offer from the government. As she notes, an attorney's failure to notify a defendant of a plea offer can constitute ineffective assistance in and of itself. *See, e.g., United States v. Rodriguez Rodriguez,* 929 F.2d 747, 752, 753 (1st Cir. 1991) (per curiam). Moreover, Donna contends that Semenza had an incentive to prevent her from cooperating due to a conflict of interest on his part, stemming mainly from the fact that Stephen was paying his legal fees. The Supreme Court has taken note of the "inherent dangers" that can arise from such a fees arrangement. *Wood v. Georgia,* 450 U.S. 261, 268 (1981). And in *Rodriguez,* where a § 2255 petitioner charged that counsel had failed to advise him of a plea offer because of such a conflict, we deemed the claim "a sufficient allegation of 'adverse effect' on representation to warrant a hearing." 929 F.2d at 752.

Nonetheless, Donna provides no basis for questioning the district court's finding that the discussion of November 18, 1992 was "neither specific nor definite enough to constitute a plea offer." The alleged "offer" was voiced to Stephen (albeit in the presence of Donna's attorney), and the participants had emphasized that the discussion was not a plea negotiation. Donna construes the proposal, not unreasonably, as calling for a guilty plea to one or more of

the § 1956 offenses (rather than for a flat 20-year sentence), such that the acceptance would have resulted in a lower prison term than the one ultimately imposed. Yet this does not add up, for she acknowledges that her offense level would have been the same whether she pled guilty to a single § 1956 charge or to the entire indictment. This means that, in terms of impact on her sentence, the alleged offer was without importance; the same benefit – the securing of a reduction for acceptance of responsibility – would have been achieved had she pled guilty to all charges. Even without learning of the discussion, Donna was obviously aware of the latter option.

In any event, the fact that Donna waited almost four years after trial before complaining about her unfulfilled wish in this regard "draws into serious question" the validity of this claim. *Ouellette v. United States,* 862 F.2d 371, 375 (1st Cir. 1988). Her contention is also belied by her own words. After proclaiming her innocence in a brief allocution at sentencing, she told the court: "If I knowingly and intentionally had committed a criminal offense, I would have pled guilty and not have elected to go to trial."

3. Joint Representation

When Adae appeared as local counsel for both Stephen and Donna, the magistrate judge explained the dangers of joint representation during a so-called *Foster* hearing. *See United States v. Foster,* 469 F.2d 1 (1st Cir. 1972). The two petitioners nonetheless persisted in their choice of Adae and waived their right to conflict-free counsel. Although her argument is muddled, Donna now apparently contends that the court was required to hold a second *Foster* hearing once Adae, while still serving as her local counsel, was

elevated to the position of lead counsel for Stephen. The failure to conduct a second such inquiry, she insists, requires automatic reversal.

Donna has not explained, and we fail to see, why a second hearing was needed. Whether Adae was serving as lead or local counsel for Stephen, the same dangers of joint representation would seem to have been presented – dangers that were fully elucidated at the first hearing. Moreover, the Supreme Court's recent *Mickens* decision negates her "automatic reversal" argument, and Donna has not even attempted to demonstrate how Adae's alleged conflict adversely affected the representation that she received.

4. Extradition

In Stephen's direct appeal, we held that the so-called CTR offenses, although nonextraditable, could nonetheless be relied on as predicate offenses without contravening the rule of specialty. *See Saccoccia,* 58 F.3d at 764-69. In Donna's direct appeal, we relied on this analysis in rejecting the same claim.[3] *See Hurley,* 63 F.3d at 24. Donna now alleges that post-trial developments in Switzerland call

[3] We clarify one apparent source of confusion in Donna's pleadings. The disposition of this claim in *Saccoccia* rested on two rationales. First, because extradition had been approved "on counts that prominently featured CTR offenses as predicates," 58 F.3d at 768, we deemed it evident that the Swiss authorities had endorsed the practice. Second, we noted that the trial court had taken "prophylactic" measures to delete the CTR references. *Id.* Inasmuch as no such measures had been taken at Donna's trial, we necessarily relied in *Hurley* on the first rationale set forth in *Saccoccia.*

this holding into question. Having reviewed her submissions, we fail to see how. It suffices to make three points. First, Donna has misstated the conclusions of the Swiss Institute of Comparative Law. That body did not find that the CTR violations "were, in fact, used to prosecute and to punish Donna" but, rather, found that they might have been used in such fashion. Second, contrary to her charge of concealment, both the Institute and the Swiss Federal Department of Justice and Police noted that the CTR references had not been deleted in Donna's case. Finally, from all that appears, none of the Swiss organizations in question suggested that a treaty violation occurred here. We thus discern no basis for revisiting the issue.

III. Stephen's Second Petition (No. 02-1556)

Stephen has recently applied for leave to file a second or successive petition (or in the alternative to amend his first petition). He alleges that Hill failed to inform him of a government "proposal," supposedly proffered in February 1992, concerning a possible plea agreement. Yet Stephen simply points in this regard to a reference to plea discussions appearing in the district court's forfeiture decision. *See Saccoccia,* 165 F. Supp. 2d at 106. No mention is there made of any specific offer that might have triggered counsel's duty to consult with his client. In any event, this claim falls well short of satisfying the pertinent gatekeeping criterion. *See* 28 U.S.C. § 2255 (¶ 8).

IV. Conclusion

For these reasons, the applications for a COA in Nos. 99-2310 & 99-2341 are *denied* and the appeals are *terminated.* The application for leave to file a second or successive petition in No. 02-1556 is *denied.*

APPENDIX B

United States Court of Appeals

For the First Circuit

No. 99-2310

DONNA SACCOCCIA,

Petitioner,

v.

UNITED STATES,

Respondent.

Nos. 99-2341
02-1556

STEPHEN A. SACCOCCIA,

Petitioner,

v.

UNITED STATES,

Respondent.

ERRATA SHEET

The opinion issued on July 29, 2002 is amended as follows:

On page 2, the phrase "*Sheldon Whitehouse,* United States Attorney, and *James H. Leavey,* Assistant U.S. Attorney, on memorandum for respondent" is deleted in its entirety.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	) CR. No. 91-0115T
v.	) In violation of 18 U.S.C. §§ 1962(d), 1957, 1956(a)(2) (A) and (B)(i), 1952(a)(3), 2, 1963, 982
STEPHEN A. SACCOCCIA	) (4TH REDACTED)

SUPERSEDING INDICTMENT

COUNT I

(RICO Conspiracy; 18 U.S.C. § 1962(d))

The Grand Jury charges:

A. INTRODUCTION

1. During the time period covered by this indictment, defendant STEPHEN SACCOCCIA, was the *de facto* owner and chief executive of Trend Precious Metals Inc., International Metal Marketing, Inc., Saccoccia Coin Company and Clinton Import/Export, which conducted business at the following locations:

Trend Precious Metals, Inc. 129 C and D Fletcher Avenue, Cranston Rhode Island, and various offices at 580 5th Avenue, New York, New York;

Saccoccia Coin Company, 1083 Park Avenue, Cranston, Rhode Island;

International Metal Marketing, Inc., 608 South Hill Street, Suite 1114, Los Angeles, California; and

Clinton Import/Export, 707 Wilshire Boulevard, Suite 4390, Los Angeles, California.

2. During the time period covered by this indictment, defendant STEPHEN SACCOCCIA would conduct the affairs of Trend Precious Metals at 580 5th Avenue, New York, New York, under the names "Manhattan Coin" and "International Metals Marketing" as well as "Trend Precious Metals."

3. During the time period covered by this indictment, coconspirators Alfred M. Gabriele, David Izzi, Richard Gizzarelli, Pat Masino, Howard Messer, Vincent Hurley, Donna Saccoccia, Kenneth Saccoccio, James Saccoccia, Anthony Demarco, Stephen Pizzo, Carlo DeMarco, Stanley Cerilla, were de facto employees of defendant STEPHEN SACCOCCIA and his companies, acting on his instructions and being paid by him and his companies.

4. During the time period covered by this indictment, Donna Saccoccia was the wife of defendant STEPHEN SACCOCCIA and worked for defendant STEPHEN SACCOCCIA in a supervisory role monitoring the shipment of large volumes of cash in amounts over $10,000 from the offices of Trend Precious Metals and/or Manhattan Coin Company in New York, New York to Trend Precious Metals and Saccoccia Coin Company in Cranston, Rhode Island. Donna Saccoccia would also supervise the conversion of these large volumes of cash into checks, the deposit of those checks into certain accounts, and the subsequent transfer of the deposited funds to other accounts outside of the state of Rhode Island.

5. During the time period covered by this indictment, co-conspirator David Izzi worked for defendant STEPHEN SACCOCCIA in a supervisory role receiving instructions

from defendant STEPHEN SACCOCCIA and overseeing and participating in the receipt of large volumes of cash in amounts over $10,000 at Trend, Precious Metals, 129 C and D Fletcher Avenue, and Saccoccia Coin, 1083 Park Avenue, Cranston, Rhode Island, its conversion into checks, and their deposit into certain accounts.

6. During the time period covered by this indictment, Vincent Hurley worked for defendant STEPHEN SACCOCCIA in a supervisory role receiving instructions from defendant STEPHEN SACCOCCIA and overseeing and participating in the receipt of large volumes of cash in amounts over $10,000 at Saccoccia Coin Company, 1083 Park Avenue, Cranston, Rhode Island its conversion into checks, and their deposit into certain accounts. Hurley also supervised the use of some of these large volumes of cash in amounts over $10,000 for the purchase of gold. Some of the gold purchased with this cash was stolen and some of it was sold "off the books" to prevent the Internal Revenue Service from determining the tax consequences of such income.

7. During the time period covered by this indictment, Anthony DeMarco worked for defendant STEPHEN SACCOCCIA as a money courier transporting large volumes of cash in amounts over $10,000 from New York, New York to Trend Precious Metals and Saccoccia Coin Company in Cranston, Rhode Island. Anthony DeMarco would also receive cash in Cranston, Rhode Island, and participate in converting it into checks, and depositing them into certain accounts in a manner designed to make it appear that the money belonged to DeMarco.

8. During the time period covered by this indictment James and Kenneth Saccoccio worked for defendant

STEPHEN SACCOCCIA as money couriers taking large volumes of cash in amounts over $10,000 from Trend Precious Metals and Saccoccia Coin Company in Cranston, Rhode Island, and converting it into checks.

9. During the time period covered by this indictment, Stephen Pizzo, Stanley Cerilla and Carlo DeMarco worked for defendant STEPHEN SACCOCCIA (Pizzo and Cerilla primarily at Saccoccia Coin Company, 1083 Park Avenue, Cranston, Rhode Island), assisting in the receipt of large volumes of cash at Trend Precious Metals and Saccoccia Coin Company in Cranston, Rhode Island, its counting, and its packaging in preparation for its conversion into checks and their deposit in certain accounts.

10. During the time period covered by this indictment, Alfred M. Gabriele was the owner and operator of Recovery Technology, Inc. (RTI), 65 Newcomb Street, Attleboro, Massachusetts, a precious metals dealer and refiner. Throughout this time, RTI maintained a gold pool account through which he received, held, and sold gold on behalf of defendant STEPHEN SACCOCCIA. Beginning in the summer of 1991, Gabriele also received and held cash on behalf of defendant SACCOCCIA. During this time period, Gabriele maintained Account No. 106920-9 in the name of RTI, Inc. at Citizens Bank in Rhode Island.

11. From March 19, 1986 to April 2, 1991, defendant STEPHEN SACCOCCIA maintained an account numbered 118-490-3 in the name of Trend Precious Metals at Citizens Bank, Providence, Rhode Island. Defendant STEPHEN SACCOCCIA and Donna Saccoccia had signatory authority over this account and verbally authorized numerous wire transfers from this account.

12. From a date unknown until November 25, 1991, defendant STEPHEN SACCOCCIA maintained an account numbered 007003919 in the name of Manhattan Coin Company at Chemical Bank, New York, New York. Defendant STEPHEN SACCOCCIA and Donna Saccoccia had signatory authority over this account and verbally authorized numerous wire transfers from this account.

13. From February 2, 1989 until November 25, 1991, defendant STEPHEN SACCOCCIA maintained an account numbered 03109-03393 in the name of International Metal Marketing at the Bank of America, South Hill Street, Los Angeles, California. Defendant STEPHEN SACCOCCIA had signatory authority over this account and verbally authorized numerous wire transfers from this account.

14. From May 12, 1988 until November 25, 1991, there was an account numbered 973-995-5 in the name of International Chain Sales at Citizens Trust Company, Providence, Rhode Island. Anthony DeMarco had signatory authority over this account, but the account was controlled by defendant STEPHEN SACCOCCIA.

15. From May 2, 1989 until November 25, 1991, defendant STEPHEN SACCOCCIA maintained an account numbered 208-741-3 in the name of Vogue Precious Metals at Citizens Trust Company, Providence, Rhode Island. Defendant STEPHEN SACCOCCIA had signatory authority over this account.

16. From April 13, 1990 until November 25, 1991, there was an account numbered 28113457-12 in the name of Refined Metals at First Bank and Trust, Providence, Rhode Island. Anthony DeMarco had signatory authority over this account, but the account was controlled by defendant STEPHEN SACCOCCIA.

17. From April 16, 1990 until November 25, 1991, there was an account numbered 0004150314 in the name of Gold Enterprises Refinery at Rhode Island Hospital Trust National Bank, Providence, Rhode Island. Anthony DeMarco had signatory authority over this account, but the account was controlled by defendant STEPHEN SACCOCCIA.

B. THE RACKETEERING CONSPIRACY

During the time period covered by this indictment, Trend Precious Metals, Inc., Saccoccia Coin Company, Manhattan Coin, International Metal Marketing, Inc., Clinton Import/Export, International Chain Sales, Vogue Precious Metals, Refined Metals, Gold Enterprises Refinery, and Recovery Technology, Inc., were a group of entities associated in fact with each other, and as such constituted an "enterprise" as defined in Title 18, United States Code, Section 1961(4).

From a date unknown and continuing through November 19, 1991, in the District of Rhode Island and elsewhere, the defendant, STEPHEN A. SACCOCCIA being a person employed by and associated with the "enterprise" described above, which was engaged in interstate and foreign commerce, did unlawfully, willfully, and knowingly combine, conspire, confederate and agree with Donna Saccoccia, Anthony DeMarco, Alfred M. Gabriele, James Saccoccio, Kenneth Saccoccio, Vincent "Mickey" Hurley, Stanley Cerilla, Stephen Pizzo, Carlo DeMarco, David Izzi, Richard Gizzarelli, Pat Masino, Howard Messer, Duvan Arboleda, Augusto Arboleda, Barry Slomovitz, Juan Mejia, Mauricio Mejia, Thomas Murphy, and others known and unknown to the Grand Jury to

conduct and to participate, directly and indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity in violation of Title 18, United States Code, Section 1962(c), which racketeering activity consisted of money laundering in violation of Title 18, United States Code, Sections 1956 and 1957, and the use of travel and facilities in interstate and foreign commerce to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of said money laundering offenses, in violation of Title 18, United States Code, Section 1952(a)(3).

It was part of the conspiracy that each defendant agreed to commit two or more acts of racketeering activity in the conduct of the affairs of the enterprise.

C. MANNER AND MEANS

The unlawful combination, conspiracy, confederation, and agreement was to be and was accomplished by the following means and in the following manners.

1. It was a part of the conspiracy that defendant STEPHEN SACCOCCIA and Donna Saccoccia, and unindicted co-conspirator Richard Gizzarelli, would receive large volumes of cash in amounts exceeding $10,000 at Rooms 606 and 1215 at 580 Fifth Avenue and Room 706 at 42 West 48th Street, New York, New York, and/or at other locations in Manhattan from couriers.

2. It was a further part of the conspiracy that defendant STEPHEN SACCOCCIA, Donna Saccoccia, and Richard Gizzarelli would receive instructions, sent via a facsimile machine, concerning the manner in which the

cash described in paragraph C.1 should be distributed to bank accounts and other locations.

3. It was a further part of the conspiracy that defendant STEPHEN SACCOCCIA, Donna Saccoccia, and Richard Gizzarelli would cause these large volumes of cash in amounts exceeding $10,000 to be shipped via Loomis or Brinks armored couriers and by private vehicle to 129 Fletcher Avenue and 1083 Park Avenue, each in Cranston, Rhode Island, and to International Metal Marketing, South Hill Street, Los Angeles, California. In the years 1990 and 1991, such shipments would typically occur on a daily basis and would contain hundreds of thousands of dollars in currency rubber-banded together in bundles of 10-, 20-, and 50-dollar bills.

4. It was a further part of the conspiracy that Anthony DeMarco, Vincent Hurley, Kenneth Saccoccio, James Saccoccio, Stanley Cerilla, Stephen Pizzo, Carlo Demarco, and David Izzi would receive these large volumes of cash in amounts over $10,000 at 129 Fletcher Avenue and 1083 Park Avenue, Cranston, Rhode Island, would count such cash on an automatic money counting machine, and would divide such cash in preparation for its transport to various banks.

5. It was a further part of the conspiracy that the defendants and co-conspirators agreed to and did use code words when describing the shipment of cash and its conversion to checks to make the discussion appear to concern a precious metals rather than a currency transaction. "Ounces" was used to refer to thousands of dollars, "karat" used to refer to the denomination of the currency, e.g., twenty karat meaning twenty dollar bills, and "high

grade" and "low grade" used to refer to high and low denomination currency.

7. It was a further part of the conspiracy that Anthony DeMarco, Kenneth Saccoccio, James Saccoccio, and David Izzi would transport the divided portions of these large volumes of cash, the portions themselves exceeding $10,000, to various banks, where the defendants and co-conspirators would use the cash to purchase checks payable to Trend Precious Metals, International Chain Sales, Vogue Precious Metals, Refined Metals, Gold Enterprises and other entities. As set forth in paragraph D.1 of the Overt Acts, between March 1990 and April 2, 1991, the defendants and co-conspirators would purchase more than 1,000 such checks.

8. It was a further part of the conspiracy that after purchasing these checks, the defendants and co-conspirators would deposit them into accounts held in the names of the respective payees, as described in paragraphs A.11 to A.17, but would later group, collect and recombine these funds in the account of Trend Precious Metals at Citizens Trust.

9. It was further part of the conspiracy that the defendants and co-conspirators would purchase some checks in amounts in excess of $10,000 and other checks in amounts under $10,000. In 1990 and the first 3 months of 1991, the defendants and co-conspirators purchased more than 400 checks in excess of $10,000 having a total value of over $26 million for deposit, directly and indirectly, into the Trend account.

10. With respect to the transactions referred to in paragraph C.7 involving the purchase of checks for an amount under $10,000, it was a further part of the

conspiracy that Anthony DeMarco, Kenneth Saccoccio, James Saccoccio and David Izzi would take a divided portion of the original large volume of cash, the divided portion still exceeding $10,000, to various banks where this cash was further divided and used to conduct transactions – that is, the purchase of two or more checks in amounts under $10,000. In 1990 and 1991, the defendants and co-conspirators purchased more than 600 such checks having a value of more than $5.5 million.

11. It was a further part of the conspiracy that in addition to depositing, directly and indirectly, the checks referred to in paragraphs C.7 through C.10 into the account of Trend Precious Metals at Citizens Trust, defendant STEPHEN SACCOCCIA would cause additional funds to be transferred by wire from the account of International Metal Marketing in California to the account of Trend Precious Metals at Citizens Trust. In 1990 and 1991, more than $53 million was transferred by wire from the International Metal Marketing Account in California to the Trend account at Citizens Trust.

12. It was a further part of the conspiracy that defendant STEPHEN SACCOCCIA and Donna Saccoccia and others would receive more than 1,000 blank money orders and travellers checks having a value of approximately $550,000, fill in the names of the purchasers, and cause these instruments to be deposited, directly and indirectly into the account of Trend Precious Metals.

13. It was further part of the conspiracy that some of the cash collected in New York and Los Angeles and shipped to Rhode Island would be used at Saccoccia Coin Company for the purchase of gold from local sources. Some of this gold was stolen and some was purchased and sold

"off the books" to prevent the Internal Revenue Service from determining the tax consequences of such transactions. These transactions were intended to convert low denomination "street level" drug proceeds into gold and to sell this gold thereby creating records to make it appear that the sources of the funds laundered were legitimate gold transactions.

14. It was further part of this conspiracy that, at the direction of defendant STEPHEN SACCOCCIA, gold would be delivered to the pool account held by Alfred M. Gabriele at RTI described in paragraph A.10 above. The gold would be held in this pool account until defendant SACCOCCIA gave instructions to sell various quantities thereof. The proceeds were deposited to Account No. 106920-9 in the name of RTI, Inc. at Citizens Trust from where such proceeds would then be transferred to accounts controlled by defendant SACCOCCIA via wire transfer or would be wire transferred to other accounts per defendant SACCOCCIA's instructions.

15. It was further part of the conspiracy that sometime in or before the fall of 1991, Alfred M. Gabriele began to receive shipments of cash in amounts over $10,000 at RTI via armored courier from persons or companies controlled by defendant SACCOCCIA in New York and Los Angeles. Gabriele also received shipments of cash in amounts over $10,000 from companies controlled by defendant SACCOCCIA in Rhode Island per defendant Saccoccia's instructions. During this time period, Gabriele and RTI acted as a repository for the cash to be laundered receiving this cash from various locations, holding it at RTI, and distributing it to other co-conspirators in Rhode Island. Gabriele also held funds and gold actually belonging to defendant SACCOCCIA at RTI, at a pool account

and in the name of RTI at another local gold refiner, and in an account at Citizens Bank in the name of RTI. Gabriele and RTI assumed this cash repository function because it was believed that the previous cash repository at 129 Fletcher Avenue, Cranston, Rhode Island was being scrutinized by law enforcement.

16. It was a further part of the conspiracy that unindicted co-conspirator Barry Slomovitz would also collect sums of currency, including the proceeds of drug trafficking, in New York, New York, and would transmit portions of those sums by wire from an account held in the name of Capitol Refiners in New York to the Trend account at Citizens Trust. In 1990 and 1991, more than $9 million was transferred by wire from Capitol Refiners to the Trend account at Citizens Trust.

17. It was a further part of the conspiracy that after Citizens Trust refused to do further business with defendant STEPHEN SACCOCCIA and closed the Trend Precious Metals account numbered 118-490-3 on April 2, 1991, defendant STEPHEN SACCOCCIA, Anthony DeMarco and David Izzi continued the scheme as before, except that instead of buying checks and depositing them into the Trend account at Citizens Trust, the defendants and co-conspirators would purchase checks in Rhode Island payable to International Metal Marketing, and send these checks via Brinks or Loomis armored couriers to International Metal Marketing in Los Angeles. Other employees of defendant STEPHEN SACCOCCIA would then take these checks and other funds to various banks in Los Angeles for deposit into the accounts held in the names International Metal Marketing, Clinton Import/Export, and RGE.

18. It was a further part of the conspiracy that defendant STEPHEN SACCOCCIA and Donna Saccoccia would cause the funds that had been deposited in the account of Trend Precious Metals at Citizens Trust, and the accounts of International Metal Marketing, Clinton Import/Export and RGE in Los Angeles, California, to be transferred by wire to various accounts in Colombia (South America), Switzerland, Florida, New York, and elsewhere according to instructions received by facsimile as described in paragraph C.2. Between March 1990 and March, 1991, the defendants and co-conspirators would transfer more than $130 million from the Trend Precious Metals account. After April 2, 1991, the defendants and co-conspirators would transfer an additional sum in excess of 40 million dollars from the International Metal Marketing, Clinton Import/Export and RGE accounts to many of the same accounts in Colombia and elsewhere.

D. OVERT ACTS

In furtherance of the conspiracy and to achieve the objects thereof, the defendants and their co-conspirators, known and unknown to the grand jury, committed and caused to be committed overt acts in the District of Rhode Island and elsewhere including the following:

1. The transactions listed in Appendix A to this indictment (which is incorporated herein) in which the person listed as "transactor" purchased a cashiers check, treasurers check or other monetary instrument with cash at the indicated domestic financial institution.

2. The transactions listed in Appendix B to this indictment (which is incorporated herein) in which cashiers checks, treasurers checks, and other monetary

instruments were deposited into the account of Trend Precious Metals at Citizens Trust.

3. The transactions listed in Appendix C to this indictment (which is incorporated herein) in which the indicated amounts were transferred by wire from the account of Trend Precious Metals at Citizens Trust to the indicated beneficiary account at another financial institution.

5. On October 28, 1991, Alfred M. Gabriele received a shipment at RTI consisting of two boxes of currency. Together with co-conspirator David Izzi, Gabriele counted this cash which totalled $98,000, the majority of which was then transferred to Saccoccia Coin Company.

All in violation of Title 18, United States Code, Section 1962(d).

COUNTS 38 TO 98

(Violations of 18 U.S.C. § 1957)

The Grand Jury further charges:

1. The allegations set forth in ¶¶ A.1 through A.22 of Count 1 of this indictment are repeated and incorporated herein.

2. On or about the dates set forth below, in the District of Rhode Island, the defendant,

STEPHEN SACCOCCIA

did knowingly engage and attempt to engage in a monetary transaction, affecting interstate commerce, in criminally derived property of a value greater than $10,000,

said property having been derived from a specified unlawful activity, to wit: the importation, buying, selling and otherwise dealing in narcotic and other dangerous drugs.

3. In each case the monetary transaction was a transfer of funds from account number 1184903 at Citizens Trust, Cranston, Rhode Island, in the amounts specified below in each Count 38 through 98, to the specified bank accounts in Miami and New York.

Count	Date	Amount	Account No.	Bank	Payee
38	01/12/90	$44,400	0189003388796	SUN BANK MIAMI	FERNANDO DUENAS
39	01/18/90	$51,000	4218329	CITIBANK INTL MIAMI	CARLOS DUENAS
41	02/02/90	$33,763	0189003388796	SUN BANK MIAMI	FERNANDO DUENAS
42	02/13/90	$92,500	0189003388796	SUN BANK MIAMI	FERNANDO DUENAS
44	03/20/90	$30,000 61,392 --- $91,392	0189003388796 32374699	SUN BANK MIAMI CITIBANK NYC	FERNANDO DUENAS DE CAFERCO LTDA
45	03/21/90	$23,200	0189003388796	SUN BANK MIAMI	FERNANDO DUENAS
46	04/10/90	$58,530	0189003388796	SUN BANK MIAMI	FERNANDO DUENAS
48	04/24/90	$35,000 $37,000 --- $72,000	4247043 8691604816	CITIBANK INTL MIAMI CHASE NYC	CARLOS DUENAS ANGELA GARCIA
49	04/26/90	$85,000 125,000 --- $210,000	0189003388796 32374699	SUN BANK MIAMI CITIBANK NYC	FERNANDO DUENAS DE CAFERCO LTDA
50	05/07/90	$85,000 65,000 --- $150,000	4247043 32374699	CITIBANK INTL MIAMI CITIBANK NYC	CARLOS DUENAS DE CAFERCO LTDA
51	05/14/90	$32,000	8691604816	CHASE NYC	ANGELA GARCIA
52	05/25/90	$49,257 90,000 --- $139,257	4247043 32374699	CITIBANK INTL MIAMI CITIBANK NYC	CARLOS DUENAS DE CAFERCO LTDA

54	06/04/90	$69,808	4247043	CITIBANK INTL MIAMI	CARLOS DUENAS
55	06/07/90	$83,000	4247043	CITIBANK INTL MIAMI	CARLOS DUENAS
		57,000	32374699	CITIBANK NYC	DE CAFERCO LTDA
		$140,000			
56	06/11/90	$18,142	0189003388796	SUN BANK MIAMI	FERNANDO DUENAS
58	06/29/90	$58,892	4247043	CITIBANK INTL MIAMI	CARLOS DUENAS
		87,000	32374699	CITIBANK NYC	DE CAFERCO LTDA
		77,000	0189003388796	SUN BANK MIAMI	FERNANDO DUENAS
		$222,892			
59	07/03/90	$71,001	4247043	CITIBANK INTL MIAMI	CARLOS DUENAS
60	07/05/90	$86,455	4247043	CITIBANK INTL MIAMI	CARLOS DUENAS
61	07/17/90	$18,768	0189003388796	SUN BANK MIAMI	FERNANDO DUENAS
63	08/16/90	$55,000	4247043	CITIBANK INTL MIAMI	CARLOS DUENAS
64	08/24/90	$36,497	32374699	CITIBANK NYC	DE CAFERCO LTDA
		63,000	4247043	CITIBANK INTL MIAMI	CARLOS DUENAS
		$99,497			
66	08/29/90	$128,000	0189003388796	SUN BANK MIAMI	FERNANDO DUENAS
		53,000	8691604816	CHASE NYC	ANGELA GARCIA
		$181,000			
67	08/30/90	$204,129	4247043	CITIBANK INTL MIAMI	CARLOS DUENAS
68	08/31/90	$84,293	4247043	CITIBANK INTL MIAMI	CARLOS DUENAS
		58,000	8691604816	CHASE NYC	ANGELA GARCIA
		49,594	32374699	CITIBANK NYC	DE CAFERCO LTDA
		$191,887			

69	09/04/90	$63,000	0189003388796	SUN BANK MIAMI	FERNANDO DUENAS
		65,000	4247043	CITIBANK INTL MIAMI	CARLOS DUENAS
		$128,000			
70	09/07/90	$89,000	32374699	CITIBANK NYC	DE CAFERCO LTDA
		48,000	32374699	CITIBANK NYC	DE CAFERCO LTDA
		53,000	8691604816	CHASE NYC	ANGELA GARCIA
		$190,000			
71	09/11/90	$86,000	4247043	CITIBANK INTL MIAMI	CARLOS DUENAS
74	09/20/90	$72,566	32374699	CITIBANK NYC	DE CAFERCO LTDA
		77,000	4247043	CITIBANK INTL MIAMI	CARLOS DUENAS
		$149,566			
75	09/27/90	$73,900	32374699	CITIBANK NYC	DE CAFERCO LTDA
		68,300	8691604816	CHASE NYC	ANGELA GARCIA
		57,800	4247043	CITIBANK INTL MIAMI	CARLOS DUENAS
		$200,000			
--	10/02/90	$70,000	4247043	CITIBANK INTL MIAMI	CARLOS DUENAS
		$68,300	8691604816	CHASE NYC	ANGELA GARCIA
		$138,300			
78	10/03/90	$154,000	32374699	CITIBANK NYC	DE CAFERCO LTDA
		87,000	4247043	CITIBANK INTL MIAMI	CARLOS DUENAS
		$241,000			
79	10/05/90	$97,000	0189003388796	SUN BANK MIAMI	FERNANDO DUENAS
		$111,000	32374699	CITIBANK NYC	DE CAFERCO LTDA
		$115,000	4247043	CITIBANK INTL MIAMI	CARLOS DUENAS
		$323,000			
80	10/11/90	$61,400	4247043	CITIBANK NYC	CARLOS DUENAS
		$87,600	8691604816	CHASE NYC	ANGELA GARCIA
		100,000	EJ557595	SWISS BANK CORP	ROSARIO ZATTA
		$81,432	32374699	CITIBANK NYC	DE CAFERCO LTDA
		$330,432			
81	10/16/90	$72,000	8691604816	CHASE NYC	ANGELA GARCIA
		81,550	32374699	CITIBANK NYC	DE CAFERCO LTDA
		47,000	0189003388796	SUN BANK MIAMI	FERNANDO DUENAS
		$200,550			
82	10/24/90	$52,000	4247043	CITIBANK INTL MIAMI	CARLOS DUENAS
		43,000	0189003388796	SUN BANK MIAMI	FERNANDO DUENAS
		33,000	8691604816	CHASE NYC	ANGELA GARCIA
		103,658	32374699	CITIBANK NYC	DE CAFERCO LTDA
		$231,658			
83	11/20/90	$87,850	4247043	CITIBANK INTL MIAMI	CARLOS DUENAS
		80,480	8691604816	CHASE NYC	ANGELA GARCIA
		$168,330			

All in violation of Title 18, United States Code, Sections 1957 and 2.

COUNTS 121-133

(Violations of 18 U.S.C. § 1956(a)(2))

The Grand Jury further charges:

1. The allegations set forth in ¶¶ A.1 through A.22 of Count 1 of this indictment are repeated and incorporated herein.

2. On or about the dates set forth below, in the District of Rhode Island, the defendant,

STEPHEN SACCOCCIA

did knowingly transport, transmit and transfer and attempt to transport, transmit and transfer funds, to wit: the amounts specified below in each Count 121 through 133, from a place in the United States (that is, account number 1184903 at Citizens Trust, Cranston, Rhode Island), to a place outside of the United States (that is, the bank specified in each Count 121 through 133):

(a) with the intent to promote the carrying on of specified unlawful activity, to wit: the importation, buying, selling and otherwise dealing in narcotic and other dangerous drugs; and

(b) knowing that said funds represented the proceeds of some form of unlawful activity, and knowing that such transportation, transmission and transfer was designed in whole and in part to conceal and disguise the source, ownership and control of the proceeds of said specified unlawful activity.

Count	Date	Payee	Amount	Bank
121	02/22/90	Manufacturas JAL	$525,820	Banco De Caldas
122	04/10/90	Manufacturas JAL	$476,700	Banco De Caldas
123	06/07/90	Manufacturas JAL	$378,214	Banco De Caldas
124	06/26/90	Manufacturas JAL	$545,000	Banco De Caldas
125	06/27/90	Manufacturas Caribe Costa	$500,000	Banco De Caldas
126	04/26/90	Astrakan Ltda Y-O Columbian Bags	$383,187	Caja De Credito
127	04/27/90	Astrakan Ltda Y-O Columbian Bags	$383,099.75	Caja De Credito
128	08/20/90	Astrakan	$147,280	Caja De Credito
129	08/24/90	Columbian Bags	$300,000	Caja De Credito
130	10/25/90	Astrakan-Cueroco	$170,000	Caja De Credito
131	10/26/90	Astrakan-Cueroco	$500,000	Banco Popular
132	10/26/90	Astrakan-Cueroco	$210,000	Caja De Credito
133	10/26/90	Astrakan-Cueroco	$120,000	Caja De Credito

All in violation of Title 18, United States Code, Sections 1956(a)(2)(A), (B)(i), and 2.

COUNTS 134 TO 141

(Travel Act Violations; 18 U.S.C. § 1952(a)(3))

The Grand Jury further charges:

The allegations set forth in ¶¶ A.1 through A.22 of Count 1 of this indictment are repeated and incorporated herein.

2. On or about the dates set forth below, in the District of Rhode Island and elsewhere, the defendant, as named below in each Count 134 through 141, knowingly travelled in interstate and foreign commerce and used a facility in interstate and foreign commerce with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, to wit: acts indictable under Title 18, United States Code, Sections 1956 and 1957.

Count	Defendant	Date	Description
134	Stephen Saccoccia	10/12/90	Transport of approx. $248,000 from N.Y. to R.I. via Conn. Tpk.
138	Stephen Saccoccia	4/3/91	Transport of cash from N.Y. to R.I. via Conn. Tpk.
139	Stephen Saccoccia	4/3/91	Shipment of 2 checks to Los Angeles via Brinks
140	Stephen Saccoccia	4/4/91	Shipment of 2 checks to Los Angeles

All in violation of 18 U.S.C. §§ 1952(a)(3) and 2.

A TRUE BILL:

_____

Foreperson

_____

LINCOLN C. ALMOND
United States Attorney

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

* * * * * * * * * * * * * * * * * *	*	CRIMINAL ACTION
UNITED STATES OF AMERICA	*	No. 91-0115T-01
	*	FRIDAY,
Plaintiff	*	MARCH 12, 1993
vs.	*	Providence, RI
STEPHEN SACCOCCIA	*	
	*	
Defendant	*	
* * * * * * * * * * * * * * * * * *		

HEARD BEFORE THE
HONORABLE ERNEST C. TORRES
DISTRICT JUDGE
(DAY XIV)

APPEARANCE:

For the Government:	James H. Leavey, Esquire and Michael E. Davitt, Esquire Assistant U.S. Attorney
For the Defendant:	Kenneth O'Donnell, Esquire and Jack Hill, Esquire
Court Reporter:	Judith L. Montie 215 Federal Building Providence, RI 02903

Proceedings reported by computer-aided stenography, transcript produced by scopist.

[2] THE COURT: Good morning.

ALL: Good morning, Your Honor.

THE COURT: Bring the Jury in, please.

(JURY PRESENT AT 8:56 A.M.)

THE COURT: Good morning, Ladies and Gentlemen.

ALL: Good morning, Your Honor.

THE COURT: I need to ask whether any of you since yesterday have talked about this case with anyone or read or heard anything about this case. If you have, just raise your hand. We are getting started early. You'll a good opportunity to continue your deliberations today. I am going to send you back to the Jury room now and you may resume your deliberations.

(JURY OUT AT 8:57 A.M.)

THE COURT: The Court will be in recess.

(RECESS TAKEN)

THE COURT: Would you bring the Jury in, please.

Would you close the door a moment before the Jury comes in. Close the door [3] one moment.

I just want to caution any spectators in the Courtroom that there should be no demonstrations of approval or disapproval from the verdict. If there are, then you are going to be removed from the Courtroom. So please just don't have any reaction whatsoever to the verdict.

All right. Would you bring the Jury in, please.

(JURY PRESENT AT 2:52 P.M.)

THE COURT: Mr. Foreman, has the Jury unanimously reached the verdict as to all of the counts charged in the indictment?

FOREMAN: Yes, Your Honor.

THE COURT: Have you completed the verdict form as to each count?

FOREMAN: Yes, Your Honor.

THE COURT: Have you signed the form at the bottom?

FOREMAN: Yes, Your Honor.

THE COURT: I ask the Clerk to please take that form from you.

(CLERK RECEIVING VERDICT [4] FORM)

THE COURT: All right. Ladies and Gentlemen, I am going to ask the Clerk to read the verdict form aloud. It is important that you listen careful as the verdict is read because when she finishes I am going to ask you whether you all agree with the verdict or whether anyone disagrees with the verdict or any part of it as read. It's also possible that one of the attorneys may ask me to pose that question to you individually. So for both reasons, it's very important that you listen carefully to be sure that this is the verdict that you voted for.

All right. Madam Clerk, would you read the verdict.

THE CLERK: Criminal Action 91-115, United States of America versus Stephen Saccoccia.

We the Jury find: Count One, conspiracy, guilty.

Counts Thirty-eight through Ninety-eight, monetary transaction in criminally derived property: Count Thirty-eight, guilty. Count Thirty-nine, guilty. Count Forty-one, guilty. Count Forty-two, guilty. Count [5] Forty-four, guilty. Count Forty-five, guilty. Count Forty-six, guilty. Count Forty-eight, guilty. Count Forty-nine, guilty. Count Fifty, guilty. Count Fifty-one, guilty. Count Fifty-two, guilty. Count Fifty-four, guilty. Count Fifty-five, guilty. Count Fifty-six, guilty. Count Fifty-eight, guilty. Count Fifty-nine, guilty. Count Sixty, guilty. Count Sixty-one, guilty. Count Sixty-three, guilty. Count Sixty-four, guilty. Count Sixty-six, guilty. Count Sixty-seven, guilty. Count Sixty-eight, guilty. Count Sixty-nine, guilty. Count Seventy, guilty. Count Seventy-one, guilty. Count Seventy-four, guilty. Count Seventy-five, guilty. Count Seventy-seven, guilty. Count Seventy-eight, guilty. Count Seventy-nine, guilty. Count Eighty, guilty. Count Eighty-one, guilty. Count Eighty-two, guilty. Count Eighty-three, guilty.

Counts One Twenty-one through One Thirty-three, money-laundering: Count One Twenty-one, guilty. Count One Twenty-two, guilty. Count One Twenty-three, guilty. Count One Twenty-four, guilty. Count One Twenty-five, guilty. Count One Twenty-six, guilty. Count One [6] Twenty-seven, guilty. Count One Twenty-eight, guilty. Count One Twenty-nine, guilty. Count One Thirty, guilty. Count One Thirty-one, guilty. Count One Thirty-two, guilty. Count One Thirty-three, guilty.

Counts One Thirty-four through One Forty-one, use of interstate commerce to promote unlawful activity: Count One Thirty-four, guilty. Count One Thirty-eight, guilty. Count One thirty-nine, guilty. Count One Forty, guilty.

THE COURT: All right. Ladies and Gentlemen, is there anyone among you who disagrees with that verdict or any portion of the verdict as read by the Clerk? If so, just raise your hand.

(NO RESPONSE)

THE COURT: Mr. O'Donnell, you wish to have the Jury polled?

MR. O'DONNELL: No, Your Honor.

THE COURT: Ladies and Gentlemen, there is one other facet to this case which we may call upon you to decide. It would be a very brief question, if it is necessary. I don't yet know if it is necessary. I am going to have to [7] confer with the attorneys for a few moments. So I'm going to ask you to return to the Jury room now. And we will determine whether we have to submit this additional question to you or not. If not, then your job will be done. If we do, then there's one additional question we have to ask you to answer.

So you may return to the Jury room for now.

(JURY OUT AT 2:58 P.M.)

THE COURT: Mr. Saccoccia, Mr. O'Donnell has told the Court that your reluctance to sign the written waiver form with respect to the forfeiture question earlier.

MR. SACCOCCIA: It is all signed, Your Honor.

THE COURT: All right. That was based on some superstition or feeling that you thought it might jinx you.

MR. SACCOCCIA: It was based on that you advised me that if a guilty verdict was given then I should sign the form so I felt I should just wait. The guilty verdicts came in and I have signed it.

THE COURT: Well, the question the [8] Court wants to make clear on, Mr. Saccoccia, is whether you do wish to waive your right to a Jury trial on the forfeiture question?

MR. SACCOCCIA: I do wish to waive and I signed that, Your Honor.

THE COURT: All right.

MR. SACCOCCIA: I appreciate the Court giving me that extra time and wait.

THE COURT: I want to be sure that the reason you didn't sign it earlier was because – not because you didn't want to waive the Jury trial but because you wanted to defer the decision until the Jury verdict came in.

MR. SACCOCCIA: I wanted to defer until the Jury reached the final verdict.

THE COURT: The Court previously explained to you, Mr. Saccoccia, what that entailed, what your right to a Jury trial was and what the pros and cons were of waiving it and you have discussed that with Mr. O'Donnell also, is that –

MR. SACCOCCIA: As far as with respect to the forfeiture?

THE COURT: Yes.

Mr. SACCOCCIA: Yes.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	*	CRIMINAL ACTIO [sic] No. 91-0115T
Plaintiff	*	
vs.	*	MONDAY, MAY 10, 1993
S. SACCOCCIA (01); D. SACCOCCIA (02) A. DEMARCO (03) J. SACCOCCIO (05) K. SACCOCCIO (06); HURLEY (07) CERILLA (09); PIZZO (10); C. DEMARCO (11) IZZI (04) IANNUCCILLI (12)	*	Providence, RI
Defendant	*	

HEARD BEFORE THE HONORABLE
ERNEST C. TORRES
DISTRICT JUDGE
(SENTENCING ISSUES)

APPEARANCE:

For the Government:

James H. Leavey, Esquire
and
Michael E. Davitt, Esquire
Assistant U.S. Attorney

For the Defendant:

Robert D. Luskin, Esquire
and
Kenneth O'Donnell, Esquire
(For: S. Saccoccia)

Lawrence J. Semenza, Esquire
(For: D. Saccoccia)

Mary June Ciresi, Esquire
(For: J. Saccoccio)

Edward C. Roy, Jr., Esquire
(For: K. Saccoccio)

Frederick G. Cass, Esquire
(For: Hurley)

James T. McCormick, Esquire
(For: Cerilla)

Robert Einhorn, Esquire
and
Richard K. Corley, Esquire
(For: Pizzo)

Vincent Indeglia, Esquire
(For: C. Demarco)

Robert Anderson, Esquire
(For: Iannuccilli)

Court Reporter:

Judith L. Montie
215 Federal Building
Providence, RI 02903

* * *

[3] THE COURT: Good morning.

ALL: Good morning, Your Honor.

THE CLERK: Criminal action 91-0115, United States of America versus Stephen Saccoccia, et al.

THE COURT: Looks as though all of the counsel and their clients are present and accounted for. Is there anyone missing, Madam Clerk?

THE CLERK: No, Your Honor.

THE COURT: All right. Now – yes, Mr. O'Donnell?

MR. O'DONNELL: I had filed this motion pro hac vice regarding Mr. Luskin and Mr. Luskin is at counsel table. I ask that it be granted.

THE COURT: All right. Do you have anything to say on that, Mr. Leavey?

MR. LEAVEY: No, Your Honor. No objection.

THE COURT: All right. The motion to admit Mr. Luskin pro hac vice for purposes of the sentencing is granted.

MR. O'DONNELL: Thank you, Your Honor.

* * *

[85] made by the Trend employees were reasonably foreseeable to Mr. Cerilla. There's no evidence whatsoever of that, Your Honor. The only evidence was that Mr. Cerilla handled the cash for the coin store and purchased the gold with it at the coin store, Your Honor. And that amount as I have previously indicated is about nine million dollars.

I think to attribute the thirty-six million to him is also incorrect. And it's – there's no showing that he counted that amount, Your Honor, or that he was involved in the

deposit of that amount and I think to go beyond the coin store and to attribute other amounts to him, Your Honor, just isn't fair. Just isn't supported by the record. So I would argue that as a maximum, Mr. Cerilla should be held accountable for the nine million and not for anything beyond that, Your Honor. Thank you.

THE COURT: Any other defense counsel wish to address this issue?

MR. LUSKIN: If I could be heard for Mr. Saccoccia.

THE COURT: Yes, Mr. Luskin.

MR. LUSKIN: I think our issues [86] are somewhat different than the other Defendants in that they don't relate to foreseeability but they certainly relate to the question of how much money ought to be attributed to Mr. Saccoccia leaving aside the question of whether one deals with the net or the gross amount.

In the first place, we have very serious concerns about using the hundred and thirty-seven million dollar figure as a benchmark. As I think the Government would agree, the Jury's verdict on the RICO conspiracy count does not constitute an endorsement in any fashion of any particular figure. Any of the Defendants under this circuit's holding in *United States* against *Winter* could be convicted of participating in the conspiracy by agreeing to any two predicate acts and the Jury could have returned a verdict of guilty on the conspiracy count having found the commission of any number of predicate acts far short of those that would total anywhere near a hundred and thirty-seven million dollars.

The way, in fact, we get to the hundred and thirty-seven million dollar figure is through the concept of relevant conduct [87] and I would suggest that we're on very thin ice when we do that. This is precisely the area where the Government is able in sentencing to say this is what we proved in the indictment, this is what we alleged but this is what we want to punish for on the other hand. And this seems to me to be a case where the Court should exercise particular care.

This is not a case where there is a large conspiracy alleged and proved and very few or only a handful of substantive offenses charged. There is a broad panoply of substantive offenses charged and proved at trial which span the entire existence of the conspiracy both chronologically and in scale. And if you sum up the total of all the transactions itemized and all the substantive offenses, we come to somewhat less than ten million dollars.

What the Government wants to suggest here is that it's possible to make the leap from nine point six million dollars which was what was proved in the substantive offenses and which ought to be a baseline figure for the amount of money involved and to leap from nine or ten million dollars to a hundred and thirty-seven [88] million dollars based on their belief that all of the money, although it was not proved in relationship to any of the substantive counts of the conspiracy, but all of the money at all times that went through any of the Trend accounts was necessarily involved in the money-laundering activity.

THE COURT: Well, don't we know, Mr. Luskin, that at least thirty-seven million of it was, because that's the amount that passed through the refinery and the coin company?

MR. LUSKIN: We know that thirty-seven million dollars in cash was collected and deposited but of the total of both the amounts of money, cash that were deposited and then wired out and the total amounts that were obtained through other means and wired out, only ten million dollars of those were charged substantively. And what I'm suggesting is that it's the Government's burden to take us from ten million dollars to a hundred and thirty-seven million dollars and that that's something that they haven't done other than just saying that it's so.

Our second concerns and these

* * *

APPENDIX F

[134] WEDNESDAY, MAY 12, 1993
SENTENCING

I would submit that the sentencing guidelines which are approved by congress should be followed in this case.

THE COURT: All right. First of all, the guidelines are uncharacteristically clear in this particular situation. Section 5(g)1.2 deals with sentencing on multiple counts of conviction. Subsection B of that section says, "Except as otherwise required by law, the sentence imposed to each count shall be the total punishment as determined in accordance with the guidelines."

Subsection D says, "That if the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively but only to the extent necessary to produce a combined sentence equal to the total punishment."

Now, of course, the problem here is that the total punishment under the guidelines is life in prison and all of the counts of convictions have statutory maximums that are expressed in terms of a finite number of years. So the question how much do we aggregate [135] the statutory maximums to come up with a sentence that is equivalent to the life sentence.

That's the question the Court will address in a few moments but first the Defendant's argument is that notwithstanding what the guidelines say, that the statute supersedes the guidelines. And it's true if the statute did say something different then the Court would be governed by the statute, not the guidelines, but in this case the

statute doesn't say something different. Title 18, Section 3584(A) simply says that when there are convictions on multiple counts the terms may run concurrently or consecutively. Subsection B says that in making that determination the Court should consider the factors set forth in section 3553(A).

As Mr. Leavey has pointed out, one of the factors enumerated in 3553(A), specifically Subsection 4, is that the kinds of sentence and the sentencing range and I am skipping some of the words that don't really apply here – well, maybe I shouldn't. "The kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of [136] Defendant as set forth in the guidelines." So what that Subsection is saying, is that one of the things the Court has to take into account is what the guidelines say. Subsection B of 3553, as Mr. Leavey has read, says, "The Court shall impose a sentence of a kind and within a range referred to Subsection A(4) . . . " that is to say, as set forth in the guidelines, "unless the Court finds that there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into consideration by the sentencing commission in formulating the guidelines."

In other words, a downward departure and the Court has already addressed that issue and found that no downward departure is warranted in this case. So the Court rejects the argument that the statute somehow takes precedence over the guidelines and either requires or permits the Court to impose a sentence different from that prescribed by the guidelines; that is to say, consecutive sentences which in the aggregate produce a combined sentence equal to the total punishment which in this case is life.

* * *

[147] sentencing.

The sentencing guidelines say a Defendant who has committed these offenses should spend the rest of his life in prison. The harm he has committed can never be rectified but the Government would submit that the punishment is appropriate and he should be sentenced to life imprisonment.

THE COURT: All right. Before the actual sentencing, the Court should make clear for the record that it finds that the probation officer has correctly calculated the net offense level in this case as level forty-five and the criminal history category as category two and therefore the guidelines call for a sentence of life.

Mr. Saccoccia, would you stand up, please, while the Court pronounces sentence.

(WITNESS COMPLIES)

THE COURT: This is never a pleasant moment for a Court, Mr. Saccoccia, to sentence someone no matter what that person may have been convicted of doing. Maybe there are some exceptions to that but very, very rare. The [148] Court doesn't have a lot to say to you. The sentence speaks for itself and in this case the sentence is basically preordained now based on findings and the guidelines. But there are a few observations that the Court feels compelled to make. Some of them are very obvious.

One is that you are a man of considerable energy and organizational talents and despite your lacking of great formal education of considerable intelligence and there is

no doubt in the Court's mind you could have been a very successful businessman had you chosen to pursue that avenue. But you chose instead to devote your talents to illegal activities on a massive scale and relating to one of the most heinous crimes that afflicts our society, narcotic trafficking which has claimed countless lives in our society. Both in terms of those who use narcotics and those who prey on others to get the money to support their habits.

Now, it is true you may be wondering why the Court is referring to narcotics trafficking, that's not what you were convicted of, that's true. There is no evidence that you directly dealt in narcotics drugs but what you [149] did made it possible for others to do so on a very extensive scale. Without the ability to launder and receive back the proceeds of the illegal narcotic sales, it would be very difficult for those people who are directly engaged in that business to operate effectively.

You've also taken a lot of people down with you and, obviously, you have a different view of those circumstances than others may have. You've made reference to the fact that those people had been used and there is no question about that. The question is used by whom. Used by the Government as you contend or used by you and from where the Court sits, the answer is the latter but that's something you have to decide and you have to live with after you sort that out in your mind.

There is no question, as Court has said earlier, you were at the pinnacle of this criminal enterprise. You were the chief executive officer and the chairman of the board and everything else rolled into one. You conceived it. You planned it. You operated it. You directed and the other

people were clearly your subordinates. Perhaps the most striking [150] thing to the Court is that you seemed to have been motivated almost entirely by greed and to this moment you have expressed no remorse whatsoever. The court accepts what you say at face value. It's apparently because you don't believe you have done anything wrong.

MR. SACCOCCIA: I am not guilty, Your Honor.

THE COURT: All right. The evidence is even after you made millions of dollars in this activity and even after you were under surveillance and knew you were under surveillance by law enforcement authorities, you continued to operate and have others engage in these operations.

After fleeing the country, the tapes indicate that you were planning to establish a similar operation in Europe. And right up to this moment you, whether you actually believe these things or not the Court has no way of knowing, but right up to this moment, at least, based on what you say, you are blaming everyone else but yourself for the situation.

In determining the sentence, Mr. Saccoccia, as the Court has said, the [151] guidelines pretty well ordain it, given the findings that have been made, the total punishment called for by the guidelines is life. By definition life is the longest sentence that can be imposed. The statutory maximums that are prescribed are all less than life. And therefore the sentences on all the counts, as far as the Court can determine, are to be consecutive to the extent necessary to produce a sentence of life. Since it's impossible to determine how long you may live which sounds like a very ghoulish proposition, as Mr. O'Donnell said, it seems to the Court there is no combination of years that

can add up to a sentence equal to life. Life is by definition the longest sentence that can be imposed on an individual.

Therefore the sentences that the Court will impose will be consecutive sentences.

Having said that, Mr. Saccoccia, with respect to Count One, the RICO conspiracy count, the Court hereby commits you to the custody of the Bureau of Prisons for a period of twenty years which is the statutory maximum.

It may be academic but [152] following the completion of that sentence the Court places you on supervised release for a period of three years. The condition being you pay the cost of supervision, as I say, that may be an academic point at this point but one the Court has to go through for the sake of completeness.

The Court also imposes a fine in the amount of two hundred fifty thousand dollars. And a special assessment in the amount of fifty dollars.

Now, with respect to the thirty-six counts of engaging in monetary transactions involving criminally derived property, the counts of conviction that are between Counts Thirty-eight and Eighty-three, you weren't convicted of all of those counts but you were convicted of thirty-six of those counts, the Court hereby commits you to the custody of the Bureau of Prisons for a period of ten years on each count. Those sentences are be served consecutively with one another and consecutive with the sentence imposed under Count One.

The Court also imposes the same period of supervised release on each of [153] those counts, three years with the same condition, that you pay the cost of supervision.

The Court further imposes a fine of two hundred fifty thousand dollars per count and a special assessment in the amount of fifty dollars per count.

With respect to the counts of conviction between Counts One Twenty-one and One Thirty-three, those are the thirteen counts of money-laundering of which you were convicted. Again you weren't convicted of every count between One Twenty-one and One Thirty-three, but as to those counts of which you do stand convicted, the Court hereby sentences you to twenty years on each count. Those terms to be served, again, consecutively with one another and consecutively with the sentences imposed on the other counts.

The Court also places you on supervised release for a period of three years with respect to each count and requires the cost of supervision as a condition of supervised release.

Now, the Court also imposes a fine in the amount of five hundred thousand [154] dollars per count and a special assessment in the amount of fifty dollars on each count.

For the Travel Act violations, those are four counts of conviction between Counts One Twenty-four and One Forty, the Court hereby sentences you to five years on each count which again is the statutory maximum. Those counts are to be served consecutively with one another and with the sentences imposed on the other counts.

Again, on each count you are placed on supervised release following the completion of your sentence for a period of three years with the same condition that you pay the cost of supervision.

The Court also imposes a fine of ten thousand dollars on each of those counts and a special assessment in the amount of fifty dollars per count.

So what we are talking about, as bizarre as it may seem, is a total of six hundred sixty years and a total fine of fifteen million seven hundred ninety thousand dollars.

We still have the forfeiture issue to address and the Court has indicated

* * *

APPENDIX G

28 U.S.C. § 994

§ 994. Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System –

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including –

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of *section 3563 (b) of title 18*;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence

implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of –

(A) the sanctions set forth in *sections 3554, 3555*, and *3556 of title 18*;

(B) the conditions of probation and supervised release set forth in *sections 3563(b)* and *3583(d) of title 18*;

(C) the sentence modification provisions set forth in *sections 3563(c), 3564, 3573*, and *3582(c) of title 18*,

(D) the fine imposition provisions set forth in *section 3572 of title 18*;

(E) the authority granted under *rule 11(e)(2) of the Federal Rules of Criminal Procedure* to accept or reject a plea agreement entered into pursuant to *rule 11(e)(1)*; and

(F) the temporary release provisions set forth in *section 3622 of title 18*, and the prerelease custody, provisions set forth in *section 3624(c) of title 18*; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in *section 3565 of title 18*, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section *3583(e) of title 18*.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by, more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance –

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance –

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in *section 3553(a)(2) of title 18, United States Code*, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and –

(1) has been convicted of a felony that is –

(A) a crime of violence; or

(B) an offense described in section 401 of the (Controlled Substances Act (*21 U.S.C. 41*), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.); and

(2) has previously been convicted of two or more prior felonies, each of which is –

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (*21 U.S.C. 841*), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant –

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect –

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of –

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of *title 18*; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in *section 3553(a)(2) of title 18, United States Code.*

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an

amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including –

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the

guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in –

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in *section 3582(c)(1)(A) of title 18*, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w) The appropriate judge or officer shall submit to the Commission in connection with each sentence imposed

(other than a sentence imposed for a petty offense, as defined in *title 18*, for which there is no applicable sentencing guideline) a written report of the sentence, the offense for which it is imposed, the age, race, and sex of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendations for legislation that the Commission concludes is warranted by that analysis.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

APPENDIX H

28 U.S.C. § 2253

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

APPENDIX I

28 U.S.C. § 2255

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court, which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A l-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section,

and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

APPENDIX J

18 U.S.C. § 3553

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to

section 944(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence. – The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the

sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) Statement of reasons for imposing a sentence. – The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice. – Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion the court shall –

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum. – Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases. – Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that –

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

APPENDIX K

18 U.S.C. § 3584

§ 3584 Multiple sentences of imprisonment

(a) Imposition of concurrent or consecutive terms. – If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) Factors to be considered in imposing concurrent or consecutive terms. – The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment being imposed, the factors set forth in section 3553(a).

(c) Treatment of multiple sentence as an aggregate. – Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

APPENDIX L

U.S.S.G. § 5G1.2

a) The sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment shall be determined by that statute and imposed independently.

(b) Except as otherwise required by law (see § 5G1.1(a), (b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter.

(c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.

(d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects sentences on all counts shall run concurrently, except to the extent otherwise required by law.

APPENDIX M

USSG § 5G1.1

(a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.

(b) Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.

(c) In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence –

(1) is not greater than the statutorily authorized maximum sentence, and

(2) is not less than any statutorily required minimum sentence.

APPENDIX N

U.S.S.G. §3D1.3

§3D1.3. OFFENSE LEVEL APPLICABLE TO EACH GROUP OF CLOSELY RELATED COUNTS

Determine the offense level applicable to each of the Groups as follows:

(a) In the case of counts grouped together pursuant to §3D1.2(a)-(c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the Group.

(b) In the case of counts grouped together pursuant to §3D1.2(d), the offense level applicable to a Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve offenses of the same general type to which different guidelines apply, apply the offense guideline that produces the highest offense level.